



October 16, 2015

**VIA PERSONAL SERVICE**

Brian Hurt  
Agent for Service of Process  
Grist Creek Aggregates, LLC  
25200 Fairbanks Lane  
Covelo, CA 95428

**Re: Notice of Violation and Intent to File Suit Under the Clean Water Act**

To Whom It May Concern:

I am writing on behalf of Friends of Outlet Creek ("FOC") with regard to violations of the Clean Water Act<sup>1</sup> ("CWA") and the requirement to have a National Pollution Discharge Elimination System Permit ("NPDES Permit") occurring at and for, respectively, Grist Creek Aggregates' Longvale Gravel Plant, located at 37342 Highway 162 / Covelo Road, Willits, California (hereinafter the "Longvale Facility" or "Facility"). The purpose of this letter is to put the owner(s) and/or operator(s) of the Longvale Facility<sup>2</sup> on notice of the ongoing violations of the Clean Water Act including, but not limited to:

- Unlawful discharges of pollutants from the highway storm drain culvert extended through the industrial site into Outlet Creek, and the failure to obtain an NPDES permit coverage for this point source discharge of pollutants into navigable waters of the United States. Failure to obtain an NPDES permit for this discernable, confined and discrete drain pipe conveying off-site storm water is an ongoing violation of the CWA.
- Unlawful discharge of pollutants / placement of fill materials into Waters of the United States without CWA section 402 or 404 permit coverage. Areas of unauthorized discharge/fill include, but are not limited to: discharge/placement of soil and gravel to both the northern and southern daylight portions of the Corral Creek culvert transecting the Facility; and discharge/placement of soil and gravel in the form of, and from, the earthen and gravel berm spanning the North/Northwest boundary of the Facility.
- Facility expansion across Highway 162, adjacent to Corral Creek, without revision to the Facility's Notice of Intent to Comply with the Industrial General Stormwater Permit, or the required Stormwater Pollution Prevention Plan for the Facility.

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<sup>1</sup> Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.*

<sup>2</sup> The owners and/or operators of the Longvale Facility are identified in Section I (B) below and referred to hereinafter as the "Longvale Facility Owners and/or Operators."



As explained below, the Longvale Facility Owners and/or Operators are liable for these violations of the Clean Water Act.

Section 505 of the Clean Water Act allows citizens to bring suit in federal court against a facility alleged to be in violation of the Clean Water Act and/or related Permits. Section 505(b) of the Clean Water Act, 33 U.S.C. § 1365(b), requires that sixty (60) days prior to the initiation of a civil action under Section 505(a) of the Clean Water Act, 33 U.S.C. § 1365(a), a citizen must give notice of his/her intention to file suit. Notice must be given to the alleged violator, the Administrator of the United States Environmental Protection Agency (“EPA”), the Regional Administrator of the EPA, the Executive Officer of the water pollution control agency in the State in which the violations occur, and, if the alleged violator is a corporation, the registered agent of the corporation. *See* 40 C.F.R. § 135.2(a)(1). This letter is being sent to you as the responsible owner(s), officer(s), and/or operator(s) of the Longvale Facility, or as the registered agent for these individuals and entities. By this letter (“Notice Letter”), pursuant to 33 U.S.C. §§ 1365(a) and (b) of the Clean Water Act, FOC puts the Grist Creek Aggregates, LLC and Longvale Facility Owners and/or Operators on notice that, after the expiration of sixty (60) days from the date of this letter, FOC intends to file an enforcement action in Federal court against them for violations of the Clean Water Act.

## **I. Background**

### **A. Friends of Outlet Creek**

FOC is an unincorporated citizen group located in Willits, California, at 39151 Helms Road, Willits, CA, 95490, (707) 841-7940. The mission and focus of FOC is to preserve and protect the natural beauty and balance of Outlet Creek, a tributary to the Eel River. FOC’s members use and enjoy the waters of the Outlet Creek, and its tributaries and receiving waters, and other area waters for various recreational, educational, spiritual and aesthetic benefits and purposes.

FOC’s members’ use and enjoyment of the waters of the Outlet Creek, the Eel River, and their tributaries are adversely impacted by operations at the Longvale Facility. Polluted storm water and non-storm water discharges from the Longvale Facility enter the Outlet Creek, a tributary to the Eel River, all considered waters of the United States (collectively “Receiving Waters”). Discharges of polluted water from the California Department of Transportation (“CalTrans”) municipal separate storm sewer system through the Longvale Facility degrade water quality and harm aquatic life in the Receiving Waters. Members of FOC live, work, and/or recreate in or around the Receiving Waters. For example, FOC members use and enjoy some or all the Receiving Waters for fishing, boating, swimming, bird watching, picnicking, viewing wildlife, and engaging in spiritual and aesthetic pursuits. The discharges of pollutants from the Longvale Facility impairs each of these uses. Further, discharges of polluted water from the Longvale Facility are ongoing and continuous. As a result, FOC’s members’ use and enjoyment of the Receiving Waters has been and continues to be adversely impacted. Thus, the interests of FOC’s members have been, are being, and will continue to be adversely affected by the failure of



the Grist Creek Aggregates and Longvale Facility Owners and/or Operators to comply with the Individual Permit requirements and the Clean Water Act.

## **B. The FOC Facility and the Owners and/or Operators of the Longvale Facility**

Information available to FOC indicates that the Longvale Facility is an approximately 17-acre privately-operated aggregate processing facility. The Longvale Facility conducts the activities or operations on site, including but not limited to aggregate processing and storage, aggregate wash operations, concrete recycling and asphalt production. The Longvale Facility Owners and/or Operators discharge pollutants from the Caltrans MS4 system, which includes roads with drainage systems, gutters, ditches, man-made channels and storm drains owned or operated by the State, to Outlet Creek, and the Eel River, waters of the United States, from at least one discharge points, according to the Longvale Gravel Plant Industrial Storm Water Pollution Prevention Plan ("SWPPP") dated June 2015. Upon information and belief, the Longvale Owners and/or Operators have never submitted an Application/Report of Waste Discharge General Information Form for Waste Discharge Requirements or NPDES Permit ("Application") to obtain NPDES Permit coverage for the point source discharge created when they connected an extension through the Longvale Facility to a highway storm drain culvert to separate industrial site water from off-site stormwater.

The Registered Agent for Grist Creek Aggregates is Brian Hurt, 25200 Fairbanks Lane Covelo, CA 95428.

The Longvale Facility Owners and/or Operators and Grist Creek Aggregates have discharged and continue to discharge pollutants unlawfully from the Longvale Facility into the Receiving Waters. As explained herein, the Longvale Facility Owners and/or Operators are liable for violations of the Clean Water Act.

## **II. The Longvale Facility, the Eel River, and Associated Discharges of Pollutants**

### **A. Storm Water Pollution and the Eel River and its tributaries**

Neither the Longvale Facility nor its Owners and/or Operators are allowed to have a point-source discharge without an NPDES Permit. Discharge from an unpermitted point source is a significant factor in the degradation of water quality for Outlet Creek and the Eel River.

The consensus among agencies and water quality specialists is that storm water pollution accounts for more than half of the total pollution entering surface waters each year. Such discharges of pollutants from industrial facilities contribute to the impairment of downstream waters and aquatic dependent wildlife. These contaminated wastewater discharges must be controlled for Outlet Creek and the Eel River, and their tributaries to regain and maintain their health.



Outlet Creek and the Eel River are ecologically sensitive areas. Although pollution and habitat destruction have diminished the Receiving Water's varied wildlife, these waters are still essential habitat for dozens of fish and bird species as well as macro-invertebrate and invertebrate species. Polluted storm water and non-storm water contaminated with sediment, heavy metals and other pollutants harm the special aesthetic and recreational significance that Outlet Creek and the Eel River have for people in the surrounding communities. The public's usage of the Receiving Waters for contact sports exposes many people to toxic metals and other contaminants from these polluted discharges. Non-contact recreational and aesthetic opportunities, such as wildlife observation, are also damaged by the illegal contaminated discharges.

The Water Quality Control Plan for the North Coast Region ("Basin Plan") establishes Water Quality Objectives for Inland Surface Waters such as Outlet Creek and the Eel River, and their tributaries. These Water Quality Objectives require that all applicable waters be maintained free of toxic substances, alone or in combination, in concentrations that produce detrimental physiological responses in human, plant, animal or aquatic life. These Water Quality Objectives are intended to protect Beneficial Uses of Surface Waters such as Outlet Creek and the Eel River, and their tributaries, including municipal drinking water, wildlife habitat, freshwater habitat, and in-water recreation

The Regional Water Board adopted the Basin Plan which establishes water quality objectives, designates beneficial uses, and contains implementation plans and policies to achieve those objectives for all waters addressed within the plan, including the Receiving Waters. Further, State Water Board Resolution No. 88-63 requires that the Regional Water Board assign the municipal and domestic supply use to water bodies that do not have beneficial uses listed in the Basin Plan. The beneficial uses of Eel River Hydrological Unit and Outlet Creek are water contact recreation (REC-1), warm freshwater aquatic habitat (WARM), cold freshwater aquatic habitat (COLD), spawning habitat (SPWN), and wildlife habitat (WILD), municipal and domestic water supply (MUN), and others. *See* Basin Plan at Table 2-1. Further, the beneficial uses of downstream waters are imputed to upstream tributaries in order to protect the beneficial uses of the downstream waters. The Basin Plan sets Water Quality Standards ("WQS") intended to control activities that can adversely affect aquatic systems and to protect these beneficial uses, including, but not limited to, standards for oil and grease, pH, and heavy metals such as copper, lead, mercury, nickel, and zinc. Polluted non-storm water and storm water from or flowing through the Longvale Facility contribute to the degradation of these beneficial uses.

The North Coast Regional Water Quality Control Board has also adopted a Total Maximum Daily Load ("TMDL") for temperature and sediment for the Eel River and Outlet Creek. The TMDL describes how trout and salmon populations in the receiving waters have declined over recent years, and describes how elevated temperatures and sedimentation have caused and contributed to these conditions. The TMDL sets forth load allocations for temperature and sediment that must be maintained in the receiving waters.



## **B. Longvale Facility's Point Source Discharge**

Discharges of polluted storm water from off-site and flowing through the property include highway surface materials such as fine particles of asphalt and concrete, highway maintenance products, erodible shoulder materials, eroding cut and filled slopes, abrasive sand, abraded rubber tires, illegal connections, illegal dumping, tracked and drifted industrial pollutants, fluids from accidents and spills and landscape care products. Such materials, activities and wastes include, but are not limited to, pollutants falling into the following categories: metals (such as copper, lead and zinc); synthetic organic compounds (pesticides); polycyclic aromatic hydrocarbons (PAHs) from vehicle emissions; antifreeze, coolant, oil and grease; total petroleum hydrocarbons (TPH); sediment; nutrients (nitrogen and phosphorous fertilizers); debris (trash and litter); pathogens; and oxygen demanding substances (decaying vegetation, animal waste, and other organic matter). Many of these pollutants are on the list of chemicals published by the State of California as known to cause cancer, birth defects, developmental, or reproductive harm. Discharges of off-site storm water and non-storm water to Outlet Creek and the Eel River, and their tributaries, pose carcinogenic and reproductive toxicity threats to the public and adversely affect the aquatic environment.

Information available to FOC also indicates that oil and grease, transmission and vehicle fluids (such as antifreeze and gasoline), metal particles, and other pollutants have been and continue to be tracked throughout Highway 162. As a result of and normal operations, trucks and vehicles leaving the Longvale Facility are pollutant sources tracking sediment, dirt, ash, oil and grease, metal particles, and other pollutants off-site. These pollutants are entrained in stormwater discharging from Highway 162.

## **C. Legal Background**

Section 301 (a) of the CWA expressly prohibits the "discharge of any pollutant" unless such discharges comply with the terms of any applicable NPDES permit, and sections 301, 302, 307, 308, and 402 of the CWA. 33 U.S.C. §§ 1311(a)(1), 1342. "Discharge of a pollutant" means any "addition of a pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Pollutant is defined to include "industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). A point source is "any discernable confined and discrete conveyance," 33 U.S.C. § 1362(14), and navigable waters are broadly defined as "the waters of the United States." 33 U.S.C. § 1362(7). NPDES permits include both general permits, which are issued under 40 C.F.R. § 122.28 authorizing a category of discharges under the CWA within a geographical area, and individual permits, which are issued to specific facilities.

NPDES permits must include conditions that will ensure compliance with the CWA. At a minimum, NPDES permits must include technology-based effluent limitations, any more stringent limitations necessary to meet water quality standards, and monitoring and reporting requirements. See 33 U.S.C. §§ 1342, 1311, 1318. NPDES permits must also implement and comply with all applicable TMDLs, including the temperature and sediment TMDL adopted for the Eel River and Outlet Creek.



CWA § 402 requires each discharger to meet minimum technology-based treatment requirements. Section 402 states that all permits must meet all applicable requirements under CWA § 301. 33 U.S.C. § 1342(a)(1). Section 301, in turn, requires all discharges to achieve, at a minimum, best practicable control technology ("BPT"). 33 U.S.C. § 1311(b)(1)(a). Discharges of toxic pollutants must be treated pursuant to the best available technology ("BAT"), 33 U.S.C. § 1311 (b)(2)(A), and other pollutant discharges must comply with best conventional technology ("BCT"). 33 U.S.C. § 1311(b)(2)(E). Municipal stormwater must be treated to the "maximum extent practicable." 33 U.S.C. § 1342(p). Each of these treatment categories is translated into effluent limitations, which must be reflected in permits as restrictions on rates quantities, and concentrations of pollutants.

In addition to implementing technology-based controls, each point source discharger must achieve "any more stringent limitation necessary to meet water quality standards[.]" 33 U.S.C. § 1311(b)(1)(C). Water quality standards establish the water quality goals for a water body. 40 C.F.R. § 131.2. They serve as the regulatory basis for the establishment of water quality-based controls over point sources, as required under § 301 and § 306 of the CWA. Once water quality standards are established for a particular water body, any NPDES permit authorizing discharges of pollutants into that water body must ensure that the applicable water quality standard will be met. 33 U.S.C. § 1311 (b)(1)(C); 40 C.F.R. §§ 122.4(d), 122.4(i), 122.44(d).

Although EPA is the primary administrator of the CWA, § 402 of the CWA authorizes EPA to delegate its authority to states to implement and administer the CWA. 33 U.S.C. § 1342(b). Pursuant to this provision, California has authority to regulate discharges of pollutants by, among other actions, issuing NPDES permits to dischargers. The State Water Resources Control Board and the nine Regional Water Quality Control Boards, including the Regional Water Quality Control Board, North Coast Region ("Regional Board") are the California agencies bearing responsibility for issuing NPDES permits.

Federal regulations define storm water as "storm water runoff, snow melt runoff, and surface runoff and drainage." 40 C.F.R. § 122.26(b)(13). Storm water can become process wastewater if it comes into direct contact with the materials, finished product byproduct, or waste product of a manufacturing process. *Id.* Permits issued for storm water or process wastewater discharges must meet all requirements of sections 402 and 301 of the CWA.

The Clean Water Act does not distinguish between those who add and those who convey what is added by others—the Act is indifferent to the originator of water pollution. The Clean Water Act bans the discharge of any pollutant by any person regardless of whether that person was the root cause or merely the current superintendent of the discharge.

Once regulated by an NPDES permit, discharges must strictly comply with all of the terms and conditions of that permit. Violators are subject to enforcement actions initiated by





EPA, states, and citizens. 33 U.S.C. §§ 1319, 1365(a). Section 505 of the CWA authorizes citizens to bring suit against any person, including a corporation, who is alleged to be in violation of an effluent standard or limitation under the CWA. 33 U.S.C. § 1365(a). Effluent limitation is defined broadly to include "a permit or condition thereof issued under [section 402] of this title," and "any unlawful act under subsection (a) of [section 301] of this title." 33 U.S.C. § 1365(f). *See also Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526 (9th Cir. 2001) (holding that citizens may bring suit against a party discharging pollutants into waters of the United States without a permit). Section 309 of the CWA, 33 U.S.C. § 1319(d), adjusted by 40 C.F.R. § 19.4, provides for civil penalties of up to \$37,500 per day per violation.

The California State Water Resources Control Board (SWRCB) issued the statewide General Permit No. CAS000001 ("General Permit"), Water Quality Order No. 2014-0057-DWQ, which applies to all stormwater discharges requiring a permit with the exception of stormwater from construction activity. To obtain coverage under the General Permit, site operators must submit a Notice of Intent ("NOI"), and must develop and implement an industrial Stormwater Pollution Prevention Plan ("SWPPP").

Under CWA section 402 a person may not discharge dredged or fill materials to waters of the United States without a Clean Water Act section 404 Permit. (33 U.S.C. § 1344.) Section 404 permits are issued and administered by the United States Army Corps of Engineers. (See 33 C.F.R. §§ 323.1-323.6.) Any deposit of dredged or fill material into waters of the United States in the absence of coverage under an individual or general Section 404 permit is a violation of the Clean Water Act.

Among other requirements, before commencement of any activity causing the dredge or fill of materials into Waters of the United States, an applicant must demonstrate that there is no practicable alternative to the proposed discharge that would have less adverse impact on the aquatic ecosystem, and that adverse effects are avoided and/or mitigated. (See 40 C.F.R. §§ 230.1-230.98.)

### **III. Violations of the Clean Water Act**

As explained above, the discharge of any pollutant to a water of the United States is prohibited unless it is in compliance with NPDES permits. *See* 33 U.S.C. §§ 1311(a), 1342; 40 C.F.R. § 126(c)(1). A failure to comply with or obtain coverage under an NPDES Permit is a violation of the Clean Water Act. Each time the Longvale Facility Owners and/or Operators discharge polluted storm water and non-storm water without a permit is a separate and distinct violation Individual Permit and Section 301(a) of the Clean Water Act, 33 U.S.C. §1311(a). These violations are ongoing and will continue each time the Longvale Facility Owners and/or Operators discharge pollutants to the Receiving Waters. The Longvale Facility Owners and/or Operators are subject to civil penalties for all violations of the Clean Water Act occurring since September 1, 2010.



As explained further below, The Longvale Facility has failed and continues to fail to comply with the requirements of the Clean Water Act. FOC place the Longvale Facility and the Longvale Owners and/or Operators on notice of violations of the Longvale Facility's arising from unpermitted discharges in violation of the Clean Water Act for each day of violation occurring from September 1, 2010 to the present.

To lawfully discharge process wastewater, storm water and non-storm water into the Receiving Waters – waters of the United States – the Longvale Facility must obtain a NPDES Permit and comply with the terms of an NPDES Permit. CWA § 301(a), 33 U.S.C. §§ 1311(a) 1342; 40 C.F.R. § 126(c)(1). The Longvale Facility's failure to obtain an Individual NPDES Permit violates the Clean Water Act. 33 U.S.C. §§ 1311(a), 1342; 40 C.F.R. § 126(c)(1). In addition, Longvale has failed to treat discharges from its unpermitted point source discharge of Caltrans stormwater to any applicable CWA standard, whether BAT, BCT, BPT, or MEP.

Moreover, Longvale has expanded Facility operations across Highway 162 without modifying its Notice of Intent to be covered by the General Permit, or its SWPPP required pursuant to the General Permit. Longvale, therefore, operates this expanded Facility adjacent to Corral Creek without permit coverage.

Further, Longvale has discharged fill materials to Corral Creek and Outlet Creek without 404 permit coverage. Areas of unauthorized discharge/fill include, but are not limited to: discharge/placement of soil and gravel to both the northern and southern daylight portions of the Corral Creek culvert transecting the Facility; and discharge/placement of soil and gravel in the form of, and from, the earthen and gravel berm spanning the North/Northwest boundary of the Facility.

#### **IV. Relief and Penalties Sought for Violations of the Clean Water Act**

Pursuant to Section 309(d) of the Clean Water Act, 33 U.S.C. § 1319(d), and the Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. § 19.4, each separate violation of the Clean Water Act subjects the violator to a penalty for all violations occurring during the period commencing five (5) years prior to the date of a notice of intent to file suit letter. These provisions of law authorize civil penalties of up to \$37,500 per day per violation for all Clean Water Act violations. In addition to civil penalties, FOC will seek injunctive relief preventing further violations of the Clean Water Act pursuant to Sections 505(a) and (d), 33 U.S.C. § 1365(a) and (d), declaratory relief, and such other relief as permitted by law. Lastly, pursuant to Section 505(d) of the Clean Water Act, 33 U.S.C. § 1365(d), FOC will seek to recover its costs, including attorneys' and experts' fees, associated with this enforcement action.

#### **V. Conclusion**

Upon expiration of the 60-day notice period, FOC will file a citizen suit under Section 505(a) of the Clean Water Act for the Longvale Facility Owners' and/or Operators' violations of





the Clean Water Act. If you believe any of the information above to be incorrect, please contact us. During the 60-day notice period, FOC is willing to discuss effective remedies for the violations noted in this letter, and actions that might be taken to remedy to ensure future compliance with the Clean Water Act. If you wish to pursue such discussions, it is suggested that you initiate those discussions immediately.

Please direct all communications to Counsel representing FOC, listed below:

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Sincerely,

Jason Flanders, Partner  
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